

Suarez v Turin Hous. Dev. Fund, Co., Inc.
2014 NY Slip Op 33283(U)
December 1, 2014
Supreme Court, New York County
Docket Number: 150374/2014
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42**

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CRUZ SUAREZ, ESTHER ALIX, and MISHA BREA,

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 150374/2014

TURIN HOUSING DEVELOPMENT FUND, CO., INC.,
RICHARD J. THOMAS, HARVEY MINSKEY, and
ELLEN DURANT, individually and as current and past
officers and board members, MARTHA MILLER, LINDA
BURSTON, ANGELA FAISON-STROBE, JACQUELINE
SEIDENBERG, EVELYN RIVERA, and VERONICA JIMENEZ,
individually and as current or past board members,
DOUGLAS ELLIMAN LLC, DOUGLAS ELLIMAN REALTY
LLC, DOUGLAS ELLIMAN PROPERTY MANAGEMENT,
DEBORAH HASSEL-DOVIES, and PATRICIA PETTWAY-
BROWN, individually and as current or past employees
or officers of DOUGLAS ELLIMAN LLC and/or DOUGLAS
ELLIMAN REALTY LLC and/or DOUGLAS ELLIMAN
PROPERTY MANAGEMENT, ALEXROD FINGERHUT &
DENNIS, and PETER A. AXELROD, individually and as
member of AXELROD FINGERHUT & DENNIS, and
JUSTIN P. GROSSMAN, individually and as MARSHAL
OF THE CITY OF NEW YORK,

Defendants

-----X
NANCY M. BANNON, J.

In this action to recover damages for, inter alia, wrongful eviction, the defendant Justin Grossman ("Grossman") moves to dismiss the complaint insofar as asserted against him on the grounds that the complaint fails to state a cause of action (CPLR 3211[a][7]). For the reasons set forth below, Grossman's motion is granted.

In their verified complaint, dated January 15, 2014, the plaintiffs assert ten causes of action arising out of their eviction from the subject cooperative apartment at 609 Columbus Ave., Apt. 6L, New York, NY, on January 28, 2013. The plaintiffs assert five causes of action against Grossman for unlawful eviction pursuant to RPAPL § 853, negligence, intentional infliction of emotional distress, conversion, and trespass to chattels.

As relevant to the instant motion, on October 1, 2012, Turin Housing Development Fund, Co., Inc. ("Turin HDFC") commenced a summary nonpayment proceeding against Alfredo Suarez in the Civil Court of the City of New York, New York County, seeking to recover possession of Apt. 6L on the grounds that Alfredo Suarez, plaintiff Cruz Suarez's late husband, failed to pay maintenance due pursuant to the parties' agreement. Because Alfredo Suarez died approximately five years earlier on September 10, 2007, he did not answer or appear in the proceeding and on December 14, 2012, Turin HDFC brought a motion for a default judgment. On January 2, 2013, the Civil Court (Hahn, J.) granted Turin HDFC's motion and issued a default judgment of possession in Turin HDFC's favor. The warrant of eviction issued on January 4, 2013 and six day notices of eviction were served on January 10, 2013. Grossman executed the warrant on January 28, 2013 at a time when the plaintiffs were not at the premises. On July 9, 2013, the Civil Court, by so-ordered stipulation, vacated the January 2013 judgment and warrant of eviction and restored the plaintiffs to possession of the subject cooperative apartment.

On March 11, 2014, Grossman moved pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against him on the grounds that, as a Marshal of the City of New York acting on a valid court order, the plaintiffs failed to state a cause of action against him. Grossman argues that he was under a mandatory duty to execute the warrant of eviction because, at the time of execution, the judgment of possession and warrant were valid. Even though the judgment and warrant were later vacated, Grossman maintains he was under no duty to investigate the validity of the warrant at the time of its execution. Grossman also argues that the plaintiffs failed to provide affirmative evidence that he knowingly or negligently executed an invalid warrant, sufficient to rebut the presumption of regularity. In addition, Grossman contends that the doctrine of qualified immunity bars the plaintiffs' claims.

In opposition, the plaintiffs argue that the warrant Grossman executed was invalid and void *ab initio* because it was based on an invalid judgment of possession. The plaintiffs contend that the warrant was invalid and Grossman knew or should have known of its invalidity because neither the proprietary lessee nor the other occupants of the apartment were named or served in the Civil Court proceeding. The plaintiffs also argue that they pled facts sufficient to overcome the presumption of regularity in that Grossman was on notice that the warrant was invalid because the warrant was issued against one person with a male name, Alfredo Suarez, but the apartment was occupied by three females. According to the plaintiffs, he, therefore, knowingly and negligently executed an invalid warrant, which is sufficient to rebut the presumption of regularity. The plaintiffs also argue that Grossman is not entitled to protection

under the doctrine of qualified immunity because he violated his official duties by acting upon a warrant he was given reason to know was invalid.

In considering a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Here, the plaintiff's complaint fails to meet even this liberal standard in that it fails to state a cognizable claim against Grossman.

New York City marshals are government officers, neutral and free of any conflict of interest concerning the recovery of collateral. See Cla-Mil E. Holding Corp. v Medallion Funding Corp., 6 NY3d 375 (2006). "Marshals do not owe allegiance to or take orders from...creditors whose collateral they recover; rather, they act under the direction of the court." Cla-Mil E. Holding Corp. v Medallion Funding Corp., 6 NY3d at 379; see Korinsky v Rose, 120 AD3d 1307 (2d Dept. 2014). A marshal may rely upon the presumption of regularity that attaches to a facially valid order of seizure, which may be overcome only by a showing that he or she knowingly or negligently executed an invalid warrant. See Korinsky v Rose, 120 AD3d 1307; Rodriguez v 1414-1422 Ogden Ave. Realty Corp., 304 AD2d 400 (1st Dept. 2003); Mayes v UVI Holdings, 280 AD2d 153 (1st Dept. 2001).

Here, accepting the facts alleged in the complaint as true, the plaintiffs failed to make a prima facie showing that Grossman knowingly or negligently executed an invalid warrant in order to overcome the presumption of regularity. See Mayes v UVI Holdings, 280 AD2d 153. Although the plaintiffs contend that the warrant of eviction was invalid and void *ab initio* because it was based on an invalid judgment of possession, the plaintiffs do not dispute that the judgment and warrant were not vacated by the Civil Court until July 9, 2013, over five months after the plaintiffs were evicted from the premises. In support of his motion to dismiss, Grossman submitted proof of service of the six day notice of eviction, the warrant of eviction, and the marshal's inventory. The warrant of eviction ordered Grossman to remove Alfredo Suarez "AND ALL OTHER PERSONS from the premises" (emphasis in original) after January 7, 2013. Grossman acted in accordance with a court order that was valid at the time of execution.

The plaintiffs failed to establish that Grossman knew or reasonably should have known that the warrant was invalid. In opposition to Grossman's motion, the plaintiffs submitted an

affidavit from Victor Brea, the nephew of plaintiff Cruz Suarez and father of plaintiff Misha Brea, who was present at the time of the eviction. Although Mr. Brea states that he told Grossman that his aunt and niece lived at the premises and asked Grossman why his aunt was being evicted, he did not convey to Grossman that Alfredo Suarez was deceased. Furthermore, the warrant of eviction authorized removal of all other persons from the premises. Mr. Brea's statements alone were insufficient to establish that the warrant may have been invalid. Although the plaintiffs allege that Grossman had a duty to inquire, they provide no support for their contention. Grossman executed the warrant with the understanding that a valid warrant of eviction had been issued. Therefore, Grossman is entitled to rely upon the presumption of regularity of the facially valid order and he is shielded from liability for any proper act done in its execution. See Korinsky v Rose, 120 AD3d 1307. Accordingly, Grossman's motion to dismiss the plaintiffs' causes of action for wrongful eviction and negligence insofar as asserted against him is granted.

In order to state a cause of action for intentional infliction of emotional distress, a plaintiff must establish "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." Howell v New York Post Co., 81 NY2d 115, 121 (1993); see Cecora v De La Hoya, 106 AD3d 565 (1st Dept. 2013). The plaintiffs here did not allege conduct on the part of Grossman that approaches the level of outrageousness or extremity necessary to support a claim of intentional infliction of emotional distress. See Howell v New York Post Co., 81 NY2d at 121-122; Cecora v De La Hoya, 106 AD3d 565; Rogin v Rogin, 90 AD3d 507 (1st Dept. 2011). Grossman's actions in executing a facially valid warrant of eviction cannot be said to be extreme and outrageous. Accordingly, Grossman's motion to dismiss the intentional infliction of emotional distress cause of action is granted.

A plaintiff must show "legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question...to the exclusion of the plaintiff's rights" in order to establish a cause of action for conversion. Independence Discount Corp. v Bressner, 47 AD2d 756, 757 (2d Dept. 1975); see NY Medscan, LLC v JC-Duggan Inc., 40 AD3d 536, 537 (1st Dept. 2007). At the time of the eviction, the judgment of possession and warrant of eviction were valid. As Grossman was authorized by the court to execute the warrant and the court adjudged that Turin HDFC had a superior right of possession to Apt. 6L, the plaintiff's complaint fails to state a cause of action for conversion as against Grossman.

To establish a cause of action for trespass to chattels, a plaintiff must allege that the defendant intentionally interfered with or harmed the condition, quality, or material value of the chattels at issue. See Level 3 Communications, LLC v Petrillo Contracting, Inc., 73 AD3d 865, 868 (2d Dept. 2010); "J. Doe No. 1" v CBS Broadcasting Inc., 24 AD3d 215, 216 (1st Dept. 2005). The plaintiffs allege that Grossman intentionally interfered with their use and enjoyment of their personal property without justification or consent, which caused them harm and damages. The plaintiffs do not allege that the condition, quality, or material value of their personal property was damaged, devalued, or interfered with in any way. Accordingly, Grossman's motion to dismiss the plaintiffs' cause of action for trespass to chattels is dismissed insofar as asserted against him.

The parties' remaining contentions are without merit.

Accordingly, it is

ORDERED that the motion of Justin P. Grossman, individually and as Marshal of the City of New York, to dismiss the complaint insofar as asserted against him is granted, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: December 1, 2014

_____, JSC
HON. NANCY M. BANNON